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THE RHETORICAL USES OF *MARBURY v. MADISON*: THE EMERGENCE OF A “GREAT CASE”

*Davison M. Douglas**

Marbury v. Madison is today indisputably one of the “great cases” of American constitutional law because of its association with the principle of judicial review. But for much of its history, Marbury has not been regarded as a seminal decision. Between 1803 and 1887, the Supreme Court never once cited Marbury for the principle of judicial review, and nineteenth-century constitutional law treatises were far more likely to cite Marbury for the decision’s discussion of writs of mandamus or the Supreme Court’s original jurisdiction than for its discussion of judicial review. During the late nineteenth century, however, the exercise of judicial review became far more controversial. Proponents of judicial review seized upon the Marbury decision to legitimize their claims for an expansive conception of the doctrine—particularly after the Court engaged in an extraordinarily controversial exercise of judicial review in 1895 in the Pollock decisions declaring the newly enacted federal income tax unconstitutional. In the process, Marbury became, for the first time, a “great case”—as measured by its treatment in judicial opinions, legal treatises, and casebooks—a moniker that would have been ill applied to the decision for most of the nineteenth century. Marbury’s significance today cannot be attributed to the pathbreaking character of the decision. Rather, Marbury became “great” because proponents of an expansive doctrine of judicial review have needed it to assume greatness.

During the past year, several law schools have held conferences to commemorate the bicentennial of the Supreme Court’s 1803 decision in *Marbury v. Madison*.¹ The prevalence of these

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1. 5 U.S. (1 Cranch) 137 (1803). These law schools include Georgetown, George Washington, John Marshall, Maryland, Michigan, Tennessee, and Wake Forest.

commemorations is not surprising. *Marbury* is widely regarded today as the most important case in American constitutional history.²

These commemorations are not the first celebrations of the greatness of the *Marbury* decision. A century ago, *Marbury* enjoyed similar glowing attention. At the centennial celebration of Chief Justice John Marshall's appointment in 1901, speaker after speaker waxed eloquent about the sublime virtues of Marshall's *Marbury* decision. "If an addition is ever made to the number of days celebrated as national anniversaries," Harvard law professor Jeremiah Smith exclaimed, "I submit that the twenty-fourth of February [the date of the *Marbury* decision] may well be added to the list."³ Arkansas Judge U.M. Rose claimed that "[n]ext to the formation of our government the decision in *Marbury v. Madison* is perhaps the most important event in our history."⁴ California lawyer Horace Platt characterized *Marbury* "as great a document as the Bill of Rights, as far-reaching as the Declaration of Independence, as essential to the healthy development of our Government under the Constitution as the Constitution itself."⁵ This praise for *Marbury* was not directed at the decision's treatment of the Supreme Court's original jurisdiction or its discussion of the proper uses of writs of mandamus. Rather, these proponents of the glories of *Marbury* focused on the decision's discussion of the principle of judicial review.

Yet this glowing praise of *Marbury* in 1901 bore a certain irony. The Supreme Court itself, during the prior century, had rarely even cited *Marbury*'s discussion of judicial review. Between 1803 and 1887, the Court *never once* cited *Marbury* for the proposition of judicial review, even when the Court issued highly controversial decisions such as *Dred Scott v. Sandford*⁶ or the *Civil Rights Cases*⁷

2. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting) (calling *Marbury* "the most famous case in our history"); JETHRO K. LIEBERMAN, *MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY* vi-vii (1976) (1974 American Bar Association poll of lawyers, judges, and law professors ranks *Marbury v. Madison* as the most important Supreme Court ruling in American history).

3. 1 JOHN MARSHALL: *LIFE, CHARACTER AND JUDICIAL SERVICES* 141 (John F. Dillon ed., 1903) [hereinafter *LIFE, CHARACTER AND JUDICIAL SERVICES*].

4. 3 *id.* at 130.

5. 3 *id.* at 231.

6. 60 U.S. (19 How.) 393 (1857). The controversial nature of the *Dred Scott* decision is beyond dispute.

7. 109 U.S. 3 (1883). The Court's decision in the *Civil Rights Cases* outraged blacks throughout the nation, particularly in the North. The decision prompted the establishment of new civil rights organizations across the North (including two hundred in Ohio alone), and led to the enactment of anti-

striking down important congressional legislation. Indeed, a perusal of the Court's use of *Marbury* during the nineteenth century suggests that the decision had far greater importance for its discussion of writs of mandamus or the Court's original jurisdiction than for its discussion of judicial review. Similarly, an examination of nineteenth-century constitutional law treatises suggests that most legal scholars did not regard *Marbury* as a seminal decision establishing the principle of judicial review. In fact, nineteenth-century treatises were more likely to cite *Marbury* as authority on questions pertaining to writs of mandamus, executive power, or the Court's original jurisdiction, than for the principle of judicial review.⁸

But during the late nineteenth century, the issue of judicial review became ensnared with the highly contentious public debate over state regulation of private economic affairs—particularly regulation designed to ameliorate the effects of industrialization, corral the power of concentrated wealth, and protect the interests of labor. Many conservative legal scholars, jurists, and politicians urged the courts to exercise judicial review more aggressively in order to curb reform efforts that interfered with private property and contract rights. Many reformers, on the other hand, attacked the courts for thwarting the will of the people through judicial review and establishing a "judicial oligarchy."

Proponents of judicial review during the late nineteenth century seized upon the *Marbury* decision and its author, Chief Justice John Marshall, to legitimize their claims for an expansive conception of the doctrine—particularly after the Court engaged in an extraordinarily controversial exercise of judicial review in 1895, declaring the newly enacted federal income tax unconstitutional.⁹ In the struggle to defend the Court's actions, judicial review enthusiasts elevated the *Marbury* decision—and Chief Justice John Marshall—to icon status to fend off attacks that the Court had acted in an unwarranted fashion. In the process, *Marbury* became, for the first time, a "great case"—as measured by its treatment in judicial opinions, legal treatises, and casebooks—a moniker that would have

discrimination legislation in eleven northern and western states within two years. Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1555 (2002); Valeria W. Weaver, *The Failure of Civil Rights 1875-1883 and Its Repercussions*, 54 J. NEGRO HIST. 368, 373-75 (1969).

8. See *infra* text accompanying notes 34-46.

9. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583 (1895) (holding unconstitutional tax on income derived from real estate), *modified*, 158 U.S. 601, 637 (1895) (extending principle of earlier decision to income derived from personal property and thereby declaring unconstitutional the entire 1894 graduated income tax).

been ill applied to the decision for most of the nineteenth century.

During the twentieth century, particularly after the onset of the Warren Court, the exercise of judicial review has remained controversial. Once again, *Marbury* has been deployed in the debate over judicial review. During the past half century, justices on the Court in high-profile exercises of judicial review of both legislation and executive action have increasingly called upon *Marbury* to justify their actions, far more frequently than at any time in the Court's history. For both conservative and liberal justices, *Marbury* has become an important rhetorical tool in the ongoing debate about the Court's proper role in American constitutional government. But the justices have used *Marbury* not only to defend judicial review in controversial cases. They have also embraced *Marbury* for other instrumental purposes—in particular, to make the Court's interpretations of constitutional text preeminent over those of other governmental actors, a move that constituted an extension of *Marbury* itself.

Today, *Marbury v. Madison* is regarded as *the* central decision in the canon of American constitutional law. But its greatness rests not on its intrinsic qualities as a legal decision nor on its historical significance in 1803. Rather, *Marbury* enjoys greatness because the doctrine with which it is so intimately associated—judicial review—has become such a significant feature of our constitutional structure.

I. JUDICIAL REVIEW PRIOR TO *MARBURY*

Although many lawyers and law students view *Marbury* as establishing the principle of judicial review, in fact, judicial review enjoyed considerable support prior to John Marshall's 1803 decision.¹⁰ Even prior to the Constitutional Convention of 1787, a few state courts had either exercised judicial review or conceded the legitimacy of the principle,¹¹ though this early use of judicial review

10. For a recent and persuasive summary of the evidence for the acceptance of judicial review prior to *Marbury*, see Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1113-17 (2001).

11. See, e.g., *Holmes v. Walton* (N.J. 1780) (court holds a state statute providing for jury with six members in violation of state constitution); *Rutgers v. Waddington* (Mayor's Ct., City of N.Y. 1784) (court stated in dicta that a state statute violated the law of nations and a treaty with Great Britain); *Bayard v. Singleton*, 1 Martin 42 (N.C. 1787) (court strikes down a state confiscation law relating to loyalist property); *Trevett v. Weedon* (Super. Ct. of R.I. 1786) (court refuses to hear a prosecution of defendant for refusing to accept paper money as legal tender; decision was widely understood as holding invalid state law providing for issuance of paper money as legal tender); *Commonwealth v. Caton*, 8 Va. (4 Call.) 5, 8 (1782) (court strikes down Virginia statute granting pardon, noting that if the "whole legislature . . . should attempt to overleap the

was not widespread and in some instances highly controversial.¹² At the 1787 Convention and the state ratifying debates, the framers discussed judicial review, with supporters of the concept outnumbering opponents.¹³

During the 1790s, the use of judicial review became more common. Some state courts, particularly in Virginia, continued to strike down statutes under state constitutions.¹⁴ Moreover, a few

bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further"). These cases, except for *Holmes v. Walton*, are reproduced in JAMES BRADLEY THAYER, *CASES ON CONSTITUTIONAL LAW* 55-80 (1894). For a discussion of these and other pre-1787 judicial review cases, see CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 88-112 (1959); CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 63-64 (1996); CHARLES WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 43-50 (1935); Austin Scott, *Holmes vs. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

12. For example, when a New York Mayor's Court in 1784 suggested in dicta the principle of judicial review of the constitutionality of legislation, see *supra* note 11, the decision provoked a sharp rebuke from the New York General Assembly which attacked the decision as "subversive of good order and the sovereignty of the state," and leading "directly to anarchy and confusion." HAINES, *supra* note 11, at 101-03; L.B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238, 245-46 (1911). In Rhode Island, after the justices of the Superior Court rendered a decision perceived as holding a state statute unconstitutional, see *supra* note 11, the General Assembly directed the justices in question to appear before the Assembly to explain their decision; in the next election, all but one of the justices were defeated. HAINES, *supra* note 11, at 109-12; Boudin, *supra*, at 246-47.

13. Klarman, *supra* note 10, at 1114. Among the supporters were Elbridge Gerry of Massachusetts, who noted that "[i]n some States, the Judges had actually set aside laws as being against the Constitution. This was done too with general approbation." WARREN, *supra* note 11, at 50. Luther Martin suggested that "[a]s to the constitutionality of laws, that point will come before the Judges in their proper official character." *Id.* Charles Warren counted twenty-two other members of the Constitutional Convention as expressing support for judicial review either contemporaneous with the Convention or within a few years thereafter. *Id.* at 50-51; see, e.g., THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Gary Wills ed., 1982) (asserting the duty of the courts "to declare all acts contrary to the manifest tenor of the constitution void"). By the same token, Warren reports that only four members of the Convention were clear opponents to judicial review. WARREN, *supra* note 11, at 51.

14. See, e.g., *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793). But not everyone embraced this use of judicial review. In 1807 and 1808, judges in Ohio were impeached for holding acts of the Ohio state legislature unconstitutional. James B. Thayer, *The Origin and Scope of the American Doctrine of*

lower federal courts struck down state statutes as violative of the federal Constitution, decisions which provoked minimal adverse response.¹⁵ All of the Supreme Court justices, while riding circuit, assumed the power of judicial review in *Hayburn's Case*¹⁶ in 1792. In 1795, Justice William Paterson in *Vanhorne's Lessee v. Dorrance*,¹⁷ also while riding circuit, declared a Pennsylvania statute to be unconstitutional.¹⁸ In *Hylton v. United States*,¹⁹ the Court refused to resolve a case on the basis of judicial review, but nevertheless signaled the Court's acknowledgment of the legitimacy of the theory.²⁰ When the Kentucky and Virginia legislatures threatened nullification of the Alien and Sedition Acts of 1798 as unconstitutional, five of the seven states that responded argued that only courts could nullify unconstitutional legislation.²¹ Leading theorists, such as James Kent, championed judicial review during the 1790s.²²

Thus, by the time of *Marbury*, the principle of judicial review was reasonably well established. Not surprisingly, the judicial review aspect of the *Marbury* decision received little notice, suggesting that Marshall's claims with respect to the authority of

Constitutional Law, 7 HARV. L. REV. 129, 133-34 (1893).

15. Klarman, *supra* note 10, at 1115.

16. 2 U.S. (2 Dall.) 409 (1792); WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 175-78 (1995); Klarman, *supra* note 10, at 1115-16.

17. 2 U.S. (2 Dall.) 304 (1795).

18. *Id.* at 320 ("The confirming act is unconstitutional and void.").

19. 3 U.S. (3 Dall.) 171 (1796).

20. CASTO, *supra* note 16, at 101-05; Klarman, *supra* note 10, at 1115-16; *see also* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring) ("If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void . . .").

21. Klarman, *supra* note 10, at 1116. Those states were Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. Frank L. Peckham, *Is the Supreme Court Guilty of "Usurpation"?*, in *CONGRESS OR THE SUPREME COURT: WHICH SHALL RULE AMERICA?* 251-52 (Egbert Ray Nichols ed., 1935).

22. Kent, in his inaugural lecture at King's College in 1794, assumed the legitimacy of judicial review:

No question can be made with us, but that the acts of the legislative body, contrary to the true intent and meaning of the Constitution, ought to be absolutely null and void. The only inquiry which can arise in the subject is, whether the legislature is not of itself the competent judge of its own constitutional limits . . . or whether the business of determining . . . is not rather the fit and exclusive province of the courts of justice The courts of justice which are organized with peculiar advantages to exempt them from the baneful influence of faction . . . are . . . the most proper power in the government to keep the legislature within the limits of its duty, and to maintain the authority of the Constitution.

James Kent, *Kent's Introductory Lecture*, 3 COLUM. L. REV. 330, 335-36 (1903).

the courts to assess the constitutionality of legislation was not controversial. Indeed, critics of the decision, including Thomas Jefferson, directed their ire not at the decision's exercise of judicial review,²³ but rather at the separation of powers implications of the suggestion that the Court might issue a writ of mandamus to a Cabinet official. That the discussion of judicial review in *Marbury* would someday cause the decision to be considered "the most famous case in our history"²⁴ could not have been predicted in 1803.

II. *MARBURY* DURING THE NINETEENTH CENTURY

Not surprisingly, *Marbury* was not considered a "great case" during most of the nineteenth century, a time of limited judicial review by the Supreme Court. The notion of judicial review of congressional statutes was not controversial during the Marshall or Taney courts, in significant measure because of its sparing use.²⁵ As Daniel Farber notes in his contribution to this Symposium, the Supreme Court's decisions demarking the relationship between the Court and the states proved far more controversial during the antebellum era than did *Marbury*'s assertion of the right of the Court to assess the constitutionality of a congressional statute.²⁶ Moreover, prior to the Civil War, the Court received more criticism for the deference it showed Congress in cases such as *McCulloch v. Maryland*,²⁷ than for its use of judicial review to void congressional legislation in *Marbury*. Between 1803 and 1864, the Supreme Court struck down only one congressional statute—portions of the 1820 Missouri Compromise in *Dred Scott*²⁸—a decision in which the Court

23. ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 102 (1989) (noting that the Court's exercise of judicial review in *Marbury* was "either approved or ignored"); HOWARD E. DEAN, *JUDICIAL REVIEW AND DEMOCRACY* 27 (1966) (noting that "even the most bitterly partisan Jeffersonian newspapers did not attack Marshall's assertion of the power of judicial review"); Klarman, *supra* note 10, at 1117 (noting that "Marshall's critics had no gripe with him" for exercising judicial review in *Marbury*). To be sure, judicial review would remain controversial in a few states after the *Marbury* decision. For example, after *Marbury*, state court judges in both Ohio and Rhode Island were impeached (though not removed) for refusing to enforce unconstitutional statutes. During the 1820s, Kentucky was roiled by a series of efforts, eventually unsuccessful, to impeach judges who declared state statutes unconstitutional. 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at 143-44.

24. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

25. CLINTON, *supra* note 23, at 161.

26. See Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 417 (2003).

27. 17 U.S. (4 Wheat.) 316 (1819).

28. 60 U.S. (19 How.) 393, 452 (1857).

failed to even mention *Marbury*. The Court also declared unconstitutional many state laws during the antebellum era, but again without explicitly relying upon the *Marbury* decision. To the extent that the Court cited *Marbury* at all during the antebellum era, it did so for the decision's discussion of writs of mandamus or original jurisdiction, not judicial review.²⁹

After the Civil War, the Court began to use judicial review to strike down federal and state legislation more frequently. Between 1865 and 1894, the Court declared congressional statutes unconstitutional in nineteen decisions.³⁰ In none of those nineteen exercises of judicial review did the Court cite *Marbury*.³¹ By the same token, between 1865 and 1898, the Court struck down 171 state laws;³² again, the Court cited *Marbury* for the principle of judicial review in none of those cases.³³ The Supreme Court did cite *Marbury* approximately fifty times between 1803 and 1894, but in almost all of those decisions the Court cited *Marbury* on issues pertaining to writs of mandamus or the Supreme Court's jurisdiction.

In a similar fashion, nineteenth-century legal scholars, for the most part, did not emphasize the connection between *Marbury* and the principle of judicial review. The two most significant constitutional law treatises of the early nineteenth century, by James Kent and Joseph Story, did cite *Marbury* for establishing the proposition of judicial review.³⁴ Most subsequent constitutional law

29. As Robert Clinton has noted, during the antebellum era, the Supreme Court "regarded *Marbury v. Madison* as having settled either a narrow jurisdictional question or a technical issue relating to the mandamus remedy." CLINTON, *supra* note 23, at 162.

30. WILFRED C. GILBERT, PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES 2-29 (Univ. Pub'ns of Am. 1975) (1936); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 87 (2000).

31. Moreover, in none of those cases did the Court cite *any* prior decision to justify its exercise of judicial review, suggesting the noncontroversial nature of the doctrine.

32. CLINTON, *supra* note 23, at 162.

33. In *Mugler v. Kansas*, 123 U.S. 623 (1887), however, the Court, though it sustained the constitutionality of a Kansas statute prohibiting the manufacture and sale of liquor, did, citing *Marbury*, reaffirm its authority to assess the constitutionality of state legislation. The decision in *Mugler* is the first time that the Court ever cited *Marbury* in connection with the principle of judicial review of legislation.

34. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 424 (Bernard D. Reams, Jr. ed., William S. Hein & Co. 1984) (1826) (claiming that "[t]he power and duty of the judiciary to disregard an unconstitutional act of congress, or of any state legislature, were declared" in *Marbury*); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH PRELIMINARY

treatises, however, did not. A perusal of nineteenth-century constitutional law treatises published after Kent and Story suggests that *Marbury's* significance lay in its discussion of writs of mandamus and the Court's original jurisdiction, not its treatment of the principle of judicial review.

Former Columbia president William Alexander Duer, for example, in his 1856 revised edition of his 1843 treatise *Constitutional Jurisprudence of the United States*, while discussing the judicial power, made the assertion that "[i]f an Act of Congress be repugnant to the Constitution, it is *ipso facto* void; and the Courts have the power, and it is their duty so to declare it."³⁵ Duer then cited more than sixty decisions in which state or federal courts, including the U.S. Supreme Court, had declared either congressional statutes, state statutes, or state constitutional provisions inconsistent with the U.S. Constitution.³⁶ Remarkably, *Marbury* is absent from Duer's lengthy list of cases in which courts had exercised judicial review of legislation. In fact, Duer's only mention of *Marbury* is in connection with a discussion of the original jurisdiction of the Court.³⁷

Thomas Cooley, an enthusiastic proponent of judicial review, in his influential 1868 treatise *Constitutional Limitations*³⁸ devoted thirty pages to a consideration "Of the Circumstances Under Which a Legislative Enactment May Be Declared Unconstitutional" without ever discussing or even mentioning *Marbury* even though

REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 701 (1833) (citing *Marbury* for the "duty of courts of justice to declare any unconstitutional law passed by congress or a state legislature void"). But for an early nineteenth-century treatise that did not associate *Marbury* with judicial review, see BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN: WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES 123-24 (Books for Libraries Press 1970) (1832) (citing *Marbury* briefly only in connection with a discussion of writs of mandamus).

35. WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 126 (2d ed. 1856). Duer's treatise was based on lectures that he had delivered each year to students at Columbia. *Id.* at xi.

36. *Id.* at 126 n.1.

37. *Id.* at 138-39.

38. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868) [hereinafter COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS]. Cooley was an enormously influential legal scholar, educator, and jurist and his treatise was the most cited commentary on constitutional law of the latter half of the nineteenth century. BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 34 (Russell & Russell, Inc. 1962) (1942).

he did discuss many other cases involving exercises of judicial review.³⁹ Moreover, in his 1880 *The General Principles of Constitutional Law in the United States of America*, essentially a student constitutional law hornbook, Cooley also downplayed *Marbury*'s relevance to judicial review, citing the case only in connection with discussions of the authority of executive officers, presidential commissions, the Court's original jurisdiction, and the ability of judicial process to reach the President.⁴⁰ Cooley did discuss judicial review in this hornbook, claiming that "the judiciary is the final authority in the construction of the Constitution and the laws, and its construction should be received and followed by the other departments," but did not cite *Marbury* as authority for that proposition.⁴¹

Other treatises published during the second half of the nineteenth century also ignored the *Marbury* decision in their discussion of judicial review. John Norton Pomeroy, dean of the law school at New York University, in his 1868 treatise *An Introduction to the Constitutional Law of the United States*, cited *Marbury* only in connection with writs of mandamus and the Supreme Court's original jurisdiction, not in connection with judicial review.⁴² To support his claim that "the national Judiciary is the final arbiter as to the meaning of the Constitution," and possesses the power to assess "the validity of a statute of Congress or of a state legislature," Pomeroy cited four Supreme Court decisions, but not *Marbury*.⁴³ Supreme Court Justice Samuel Miller, who served on the Court from 1862 until his death in 1890, described *Marbury* in an 1889 lecture as a "very lengthy, and an exhaustive discussion of the power of a court of law to compel officers by the writ of *mandamus* to discharge duties which it is clear they are bound to perform, and in regard to which they have no discretion."⁴⁴ Justice Miller, whose

39. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, *supra* note 38, at 159-88. Cooley, in another section of his treatise, did cite *Marbury* on one occasion—as one of the "very numerous authorities upon the subject" of the "right and the power of the courts" to assess the constitutionality of legislative pronouncements. *Id.* at 45-46 & n.1. In subsequent editions of his famous treatise published over the course of the next thirty years, Cooley gave the *Marbury* decision no greater emphasis.

40. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 115, 119, 128-29, 175-76 (Andrew C. McLaughlin ed., 3d ed. 1898).

41. *Id.* at 158. In fact, Cooley offered no case support for this claim. *Id.*

42. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 419, 423, 516 (1868).

43. *Id.* at 95-96.

44. SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 385 (J.C. Bancroft Davis ed., 1891). This lecture was given in

constitutional law lectures were published posthumously in 1891, underscored the importance of the decision's treatment of writs of mandamus issue:

The immense importance of this decision [*Marbury*] . . . may be appreciated when it is understood that the principles declared . . . subjected the ministerial and executive officers of the Government, all over the country, to the control of the courts, in regard to the execution of a large part of their duties. Its application to the very highest officers of the Government, except perhaps the President himself, has been illustrated in numerous cases in the courts of the United States . . .⁴⁵

But Justice Miller made no mention of the *Marbury* decision's discussion of judicial review of legislation in his constitutional law lectures.

As a final example of a nineteenth-century treatise that understated the importance of *Marbury*, John Burgess, dean of the faculty of political science at Columbia, published a two-volume treatise in 1893, *Political Science and Comparative Constitutional Law*, in which he discussed judicial review but without reference to *Marbury*. Burgess cited *Marbury* only in his discussion of the commissioning of judges and the Court's original jurisdiction.⁴⁶

1889. 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at 360.

45. MILLER, *supra* note 44, at 386.

46. 2 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 322-23, 329 (1890). One other nineteenth-century constitutional law treatise writer who did not cite *Marbury* for the principle of judicial review was University of Missouri law professor Christopher Tiedeman. Tiedeman noted that "[w]henever an act of the legislature contravenes a constitutional provision, it is void, and it is the duty of the courts so to declare it." CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 5 (1886) [hereinafter TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER]. Tiedeman cited neither *Marbury* nor any other case for that proposition.

To be sure, a few nineteenth-century constitutional law treatises did cite *Marbury* for the principle of judicial review. Theodore Sedgewick's 1857 treatise, *The Interpretation and Construction of Statutory and Constitutional Law*, citing James Kent's *Commentaries on American Law*, *supra* note 34, noted that "courts of justice . . . have, since the earliest days of our republic, steadily and vigorously applied" the doctrine of judicial review, and indicated that the "doctrine may be considered as having been finally settled in *Marbury vs. Madison*." THEODORE SEDGEWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 216 (1857). In the context of discussing various exercises of judicial review in the late eighteenth and early nineteenth centuries, Sedgewick also notes that the "principle [of judicial review was] deliberately and definitively settled" in *Marbury*. *Id.* at 479.

In part, the dearth of references to *Marbury* in both judicial opinions and constitutional law treatises reflected the fact that for much of the nineteenth century, the issue of judicial review itself was far less controversial than the issue of what its proper scope should be.⁴⁷ Many treatises of the post-Civil War era, for example, spent considerably more space discussing the question whether courts should strike down statutes that offended notions of "natural justice" as opposed to a specific constitutional provision,⁴⁸ than they did discussing the principle of judicial review itself.

III. *MARBURY* DURING THE POPULIST AND PROGRESSIVE ERAS

During the late nineteenth and early twentieth centuries, the issue of judicial review became far more controversial, as courts began to exercise judicial review far more frequently than ever before. This expanded use of judicial review, in response to an array of legislative reform efforts designed to ameliorate the effects of rapid industrialization and to protect the interests of workers, provoked intense controversy. Proponents of judicial review utilized *Marbury* to defend their position. After ninety years of relative insignificance as a decision associated with judicial review, *Marbury*

Columbia law professor John Ordronaux's 1891 *Constitutional Legislation in the United States*, noted that "the laws of the United States, themselves, are only valid when made in pursuance of the Constitution; and any enactment, whether Federal or State, which is repugnant to it, is void, being in violation of this fundamental law." JOHN ORDRONAU, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES: ITS ORIGIN, AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS, AND OF STATE LEGISLATURES 210 (1891). Ordronaux relies on *Marbury* for this proposition, along with five other cases, including the Supreme Court's 1792 decision in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). *Id.* at 210 n.1. Ordronaux, however, offered a limited characterization of the doctrine of judicial review. Citing *Marbury* along with several cases and treatises, he claimed that "the decisions of even our highest courts are accepted as a finality only in relation to the particular cases with which they happen to deal, and their judgments do not impose compulsory limitations upon the action of any other department." *Id.* at 420.

47. NELSON, *supra* note 30, at 86-87 (noting that by the middle of the nineteenth century, "judicial review had become an accepted feature of American law. . . . With the doctrine firmly established, judges began to exercise their power of review with greater frequency, and . . . in a fashion that involved them in substantial controversy.").

48. For example, both Thomas Cooley and Christopher Tiedeman in their treatises engaged in lengthy discussions of the question whether, in Tiedeman's words, courts could "declare an act of the legislature void, because it violates some abstract rule of justice, when there is no constitutional prohibition." TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER, *supra* note 46, at 5-13; see also COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, *supra* note 38, at 164-70.

became an important precedent for courts and commentators seeking to justify the exercise of judicial review. In the process, *Marbury* became, for many, one of the "great cases" of American constitutional law.

During the 1880s and early 1890s, a number of jurists and legal scholars expressed alarm at the growth in state and federal legislation regulating economic affairs. University of Missouri law professor Christopher Tiedeman, for example, in his influential 1886 treatise *Limitations of Police Power in the United States*, wrote with great passion about the dangers of legislative excess:

Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. . . . The demands of Socialists and Communists vary in degree and in detail, and the most extreme of them insist upon the assumption by government of the paternal character altogether. . . .

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.
⁴⁹
 . . .

Supreme Court Justice David Brewer expressed similar concerns about legislative excess in his 1892 dissenting opinion in *Budd v. New York*,⁵⁰ in which the Court upheld a New York statute regulating the fees of grain elevators against a constitutional challenge: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."⁵¹

49. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER, *supra* note 46, at vi-vii.

50. 143 U.S. 517, 549-52 (1892) (Brewer, J., dissenting).

51. *Id.* at 551. Other late nineteenth-century lawyers also expressed concern about the excesses of legislatures. Former U.S. Senator Waitman Willey of West Virginia addressed his state's bar association in 1887 and spoke of the need for lawyers to impose "a wholesome check upon those tendencies to licentiousness and disorder incident to popular institutions." ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 21 (1960). Similarly, Georgia attorney I.E. Shumate, in an 1887

Both Tiedeman and Brewer called on courts to enforce both constitutional and "natural rights" norms against legislative excess.⁵² In an 1887 lecture subsequently published in his 1890 book, *The Unwritten Constitution of the United States*, Tiedeman articulated an expansive vision of "natural rights" which courts must enforce against legislative encroachment:

Under the stress of economical relations, the clashing of private interests, the conflicts of labor and capital, the old superstition that government has the power to banish evil from the earth . . . has been revived; and all these so-called *natural rights*, which the framers of our constitutions declared to be inalienable, and the violation of which they pronounced to be a just cause for rebellion, are in imminent danger of serious infringement. . . .

. . . .

In these days of great social unrest, we applaud the disposition of the courts to seize hold of these general declaration of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual's *natural rights*, even though these acts do not violate any specific or special provision of the Constitution. . . .⁵³

address to his state's bar association, worried about the increase in legislative regulation of private affairs which he feared was "affecting the conduct of almost every branch of business and controlling the private conduct of men in all relations of life." *Id.* at 22. Shumate criticized the courts for their failure to control this legislative activity. *Id.* at 22-23.

52. Tiedeman, for example, wrote:

[U]nder the written constitutions, Federal and State, democratic absolutism is impossible in this country, as long as the popular reverence for the constitutions, in their restrictions upon governmental activity, is nourished and sustained by a prompt avoidance by the courts of any violations of their provisions, in word or in spirit.

TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER, *supra* note 46, at vii.

53. CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 79-82 (1890) (emphasis added). Tiedeman went on to define the scope of these "natural rights":

[T]he doctrine of natural rights may be tersely stated to be a freedom from all legal restraint that is not needed to prevent injury to others; . . . or, to employ the language of Herbert Spencer: "Every man has freedom to do aught that he wills, provided he infringes not the equal freedom of any other man."

Id. at 76 (footnote omitted) (quoting HERBERT SPENCER, *SOCIAL STATICS; OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* 121 (1851)).

Similarly, in 1893, in a speech to the New York State Bar Association, Justice Brewer offered a robust defense of the role of courts in the protection of individual liberty through judicial review. Like Tiedeman, Brewer urged the courts to protect economic liberty not just under the Constitution but also with reference to principles of natural law:

The courts . . . make no laws, they establish no policy, they never enter into the domain of popular action. They do not govern. Their functions in relation to the State are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law.⁵⁴

During the 1880s and 1890s, many state courts began to exercise judicial review more frequently, striking down state legislation that infringed private contract and property rights.⁵⁵ These decisions delighted conservatives like Tiedeman and Brewer, but dismayed social reformers, such as Populist James Weaver.⁵⁶ In

54. Quoted in CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 157 (rev. ed. 1994) (emphasis added). See also David J. Brewer, *Protection to Private Property from Public Attack*, 256 YALE REV. 97, 103 (1891) (appealing to "natural justice" as demanding protection for private property).

Other justices of the U.S. Supreme Court also appealed to natural law principles to reject legislation. In *Powell v. Pennsylvania*, 127 U.S. 678 (1888), Justice Stephen Field dissented from the Court's decision upholding a Pennsylvania statute prohibiting the manufacture of oleomargarine. Justice Field argued in part that the statute impeded "[t]he right to pursue one's happiness [which] is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by . . . force of legislative or constitutional enactments, but by their Creator . . ." *Id.* at 692.

55. See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 26-27 (1994) (noting the sharp increase between 1880 and 1900 in the number of state court decisions striking down legislation); Edward S. Corwin, *The Extension of Judicial Review in New York: 1783-1905*, 15 MICH. L. REV. 281, 285 (1917) (noting that New York state courts invalidated ninety-nine state statutes during the 1890s, more than twice the number invalidated during any other decade of the nineteenth century); Charles Grove Haines, *History of Judicial Review, in CONGRESS OR THE SUPREME COURT: WHICH SHALL RULE AMERICA?*, *supra* note 21, at 70 (arguing that "the decade beginning in 1880 may be regarded as the dividing line between the earlier stage when judicial review of legislative enactments was of relatively minor significance and the later stage in which this practice becomes one of the central and controlling features of the American system of government"); James M. Rosenthal, *Massachusetts Acts and Resolves Declared Unconstitutional by the Supreme Judicial Court of Massachusetts*, 1 MASS. L.Q. 301, 303-15 (1916) (noting that of all the state statutes declared unconstitutional by the Supreme Judicial Court of Massachusetts between 1804 and 1915, twenty-eight percent were struck down during the 1890s).

56. See, e.g., ROSS, *supra* note 55, at 27 (citing JAMES B. WEAVER, *A CALL TO*

the meantime, lawyers and legal scholars during the 1880s and 1890s debated the proper scope of judicial review, debates that on occasion involved competing interpretations of the *Marbury* decision.⁵⁷ Finally, in 1895, the U.S. Supreme Court expressly relied on *Marbury* for the first time to justify striking down legislation in *Pollock v. Farmers' Loan & Trust Co.*⁵⁸ The *Pollock* case would help significantly elevate the status of *Marbury* in American constitutional law.

During the early 1890s, Populists urged a graduated income tax to meet the federal budget deficit.⁵⁹ Although the tax enacted in August 1894 provided for only a two percent tax rate on incomes above \$4000, it provoked a vituperous response from opponents who dismissed it as "class legislation" and "war upon honest industry."⁶⁰ United States Senator David Hill of New York described the tax as the work of "anarchists, communists, and socialists."⁶¹ John Forrest Dillon, a Wall Street lawyer, former state and federal judge, and enthusiastic proponent of laissez faire,⁶² characterized the tax as "class legislation of the most pronounced and vicious type" and argued that it was "violative of the constitutional rights of the property owner, subversive of the existing social polity, and essentially revolutionary."⁶³

Efforts were immediately launched to challenge the constitutionality of the new income tax in court on the grounds that it was a "direct tax" required under Article I of the Constitution to be apportioned among the states based on population. Within months, a legal challenge to the tax supported by several of the

ACTION (1892), which favored limits on judicial power, arguing that judicial review "dethrones the people who should be Sovereign and enthrones an oligarchy").

57. CLINTON, *supra* note 23, at 166-75.

58. 157 U.S. 429, 583 (holding unconstitutional tax on income derived from real estate), *modified*, 158 U.S. 601, 637 (1895) (extending principle of the earlier decision to income derived from personal property and thereby declaring unconstitutional the entire 1894 graduated income tax).

59. For a discussion of the history of support and opposition to the income tax, see Elmer Ellis, *Public Opinion and the Income Tax, 1860-1900*, 27 MISS. VALLEY HIST. REV. 225 (1940).

60. *Id.* at 236-38.

61. *Id.* at 238.

62. Dillon was also the author of the late nineteenth-century's most authoritative treatise on municipal bonds, *Law of Municipal Corporations*. "Dillon's Rule" provided that cities were completely subject to the will of their state legislatures and that federal courts were empowered to enforce this subjection if state courts refused to do so. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 223 (1989).

63. PAUL, *supra* note 51, at 164.

nation's leading attorneys made its way to the United States Supreme Court. Joseph Choate, one of the lawyers who brought the litigation challenging the tax, claimed in oral argument before the Supreme Court that the tax was "communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic . . . as ever have been addressed to any political assembly in the world."⁶⁴ Choate elaborated:

I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was . . . in danger According to the doctrines that have been propounded here this morning, even that great fundamental principle has been scattered to the winds.⁶⁵

"I do not believe that any member of this court ever has sat or ever will sit to hear and decide a case the consequences of which will be so far-reaching as this," Choate claimed at the conclusion of his oral argument, "not even the venerable member [Justice Stephen Field] who survives from the early days of the civil war, and has sat upon every question of reconstruction, of national destiny, of state destiny that has come up during the last thirty years."⁶⁶ If the Court did not intercede, Choate warned, "this communistic march goes on."⁶⁷

In closing his oral argument in the *Pollock* case, Choate appealed to both *Marbury* and John Marshall for support, something that litigants in many prior cases challenging the constitutionality of legislation that infringed property and contract rights had not done.⁶⁸ Choate urged the Court to act despite popular

64. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 532 (argument of Joseph H. Choate), *modified*, 158 U.S. 601 (1895).

65. *Id.* at 534 (argument of Joseph H. Choate).

66. *Id.* at 553 (argument of Joseph H. Choate).

67. *Id.* at 533 (argument of Joseph H. Choate).

68. In earlier cases involving challenges to the constitutionality of various federal and state statutes, litigants had not used *Marbury* to bolster their case. For example, the party challenging the constitutionality of a Kansas statute prohibiting the manufacture and sale of liquor in *Mugler v. Kansas*, 123 U.S. 623 (1887), cited a number of cases in support of its argument for an exercise of judicial review, including *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), but not *Marbury*. Brief for Plaintiff in Error at 15-16, 30, *Mugler v. Kansas*, 123 U.S. 623 (1887). In *Munn v. Illinois*, 94 U.S. 113 (1877), the plaintiff cited a number of state court cases in support of its argument for an exercise of judicial review, but also did not cite *Marbury*. Brief for Plaintiffs in Error at 28-31, *Munn v. Illinois*, 94 U.S. 113 (1877). For other cases in which parties challenging the constitutionality of state legislation did not cite *Marbury*, see Brief for Plaintiff

support for the statute:

[I]f it be true that a mighty army of sixty million citizens is likely to be incensed by this decision, it is the more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it *has* the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in executing that power, no matter what the threatened consequences of popular or populist wrath may be.⁶⁹

The income tax appeared to be a constitutional exercise of congressional power. In fact, the Court had previously—and without dissent—sustained the use of an income tax promulgated during the Civil War against an argument that it was a direct tax.⁷⁰ But in the two *Pollock* decisions of the spring of 1895—the first in which the Court considered, among other issues, the

in *Error*, *Budd v. New York*, 143 U.S. 517 (1891); Brief for Appellees, *Kansas v. Ziebold*, 123 U.S. 623 (1887). Admittedly, each of these cases involved the constitutionality of *state* legislation for which a citation to *Marbury* might have been less appropriate, but late nineteenth-century litigants challenging the constitutionality of *congressional* legislation also failed to cite *Marbury*. See briefs filed in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Callan v. Wilson*, 127 U.S. 540 (1888); *Baldwin v. Franks*, 120 U.S. 678 (1887); *Boyd v. United States*, 116 U.S. 616 (1886); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Trademark Cases*, 100 U.S. 82 (1879); *United States v. Fox*, 95 U.S. 670 (1878); *United States v. Reese*, 92 U.S. 214 (1876).

69. *Pollock*, 157 U.S. at 553 (argument of Joseph H. Choate). Choate's comments were in response to those of James C. Carter, who defended the statute:

Nothing could be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit. When the opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is not a question of law, but of legislation, the only path of safety is to accept the voice of the majority as final.

Id. at 531-32 (argument of James C. Carter).

70. *Springer v. United States*, 102 U.S. 586, 602 (1881) ("Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the [income] tax of which the plaintiff in error complains is within the category of an excise or duty."); see also Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV. L. REV. 198, 198 (1895) (concluding that the Court in *Pollock* "deliver[ed] an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years"). For an excellent discussion of the Civil War income tax and the Court's consideration of the constitutionality of that tax in *Springer*, see ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913*, at 15-99 (1993).

constitutionality of taxing income derived from real property and the second in which the Court considered the constitutionality of taxing income derived from personal property—the Court struck down the income tax statute as an unconstitutional direct tax. The conservative majority on the Court clearly viewed any type of income tax as an attack on propertied interests. In his concurrence, Justice Field thundered: "The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."⁷¹ Justice John Marshall Harlan later commented that Justice Field had "acted often like a mad man during the whole of this contest about the income tax."⁷²

The *Pollock* dissenters were particularly vitriolic in their characterization of the majority's actions. Justice Howell Jackson, who had traveled from his Tennessee sickbed to hear reargument on the personal property issue, labeled the Court's decision "the most disastrous blow ever struck at the constitutional power of Congress."⁷³ (Jackson's dissent would be his last opinion; he would be dead within three months.⁷⁴) Justice Henry Brown characterized the Court's decision as "nothing less than a surrender of the taxing power to the moneyed class . . . fraught with immeasurable danger to the future of the country," and a decision that "approaches the proportions of a national calamity"⁷⁵ "It is certainly a strange commentary upon the Constitution of the United States and upon a democratic government," Brown charged, "that Congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized State I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth."⁷⁶ Justice Harlan, pounding the bench

71. *Pollock*, 157 U.S. at 607 (Field, J., concurring).

72. David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 179 (1951).

73. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 706 (1895) (Jackson, J., dissenting).

74. PAUL, *supra* note 51, at 213.

75. *Pollock*, 158 U.S. at 695 (Brown, J., dissenting).

76. *Id.* Brown offered a different vision of judicial review than that engaged in by the majority:

It is never a light thing to set aside the deliberate will of the legislature, and in my opinion it should never be done, except upon the clearest proof of its conflict with fundamental law. Respect for the Constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of Congress.

Id.

with his fist while delivering his dissent,⁷⁷ called the decision "a disaster to the country,"⁷⁸ and predicted in a letter to his sons a few weeks later that the decision "will become as hateful with the American people as the Dred Scott case was when it was decided The recent decision will have the effect, if the country recognizes it permanently as good law, to make the freemen of America the slaves of accumulated wealth."⁷⁹ Justice Edward White rebuked his colleagues in the majority for ignoring clear precedent:

The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result If the permanency of [the Court's] conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency.⁸⁰

Faced with a popular piece of congressional legislation,⁸¹ a unanimous precedent sustaining an earlier federal income tax,⁸² and bitter division within the Court, Chief Justice Melville Fuller called upon the *Marbury* decision to defend the Court's questionable exercise of judicial review. At the outset of his opinion for the Court in the real property decision in the case, Fuller made a direct appeal to *Marbury*:

Since the opinion in *Marbury v. Madison* . . . was delivered, it has not been doubted that it is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly.⁸³

Fuller then proceeded to quote at length from Marshall's opinion in *Marbury*:

"If," said Chief Justice Marshall, "both the law and the

77. Farrelly, *supra* note 72, at 177.

78. *Pollock*, 158 U.S. at 684 (Harlan, J., dissenting).

79. Quoted in Farrelly, *supra* note 72, at 180.

80. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 650-51, *modified*, 158 U.S. 601 (1895).

81. According to one historian of the tax controversy, the 1894 income tax was "unquestionably desired by a majority of the voters at that time." Ellis, *supra* note 59, at 242.

82. See *supra* note 70.

83. *Pollock*, 157 U.S. at 554 (citation omitted).

Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." And the Chief Justice added that the doctrine "that courts must close their eyes on the Constitution, and see only the law," "would subvert the very foundation of all written constitutions."⁸⁴

Fuller's use of the *Marbury* decision to justify the Court's action was unprecedented. Never before in its history had the Court deployed the *Marbury* decision to justify an exercise of judicial review. Moreover, during the ninety-two years between *Marbury* and *Pollock*, the Court had never once seen it necessary when declaring a congressional statute unconstitutional to defend its power to exercise judicial review by reference to the authority of an earlier decision. In all prior cases, the Court merely asserted its power to declare a congressional statute unconstitutional without specifically citing case authority supporting that course of action.⁸⁵

The Court's inaugural use of the *Marbury* decision to defend an exercise of judicial review was saved for an extraordinarily controversial decision in which the Court's judgment was highly vulnerable to criticism. The Court thus began a pattern that would continue in the twentieth century of citing *Marbury* and quoting Chief Justice Marshall when the stakes were particularly high.⁸⁶

The *Pollock* decisions were clearly among the most controversial

84. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

85. See *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Callan v. Wilson*, 127 U.S. 540 (1888); *Baldwin v. Franks*, 120 U.S. 678 (1887); *Boyd v. United States*, 116 U.S. 616 (1886); *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883); *Trademark Cases*, 100 U.S. 82 (1879); *United States v. Fox*, 95 U.S. 670 (1878); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. R.R. Co.*, 84 U.S. (17 Wall.) 322 (1873); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870); *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); *The Alicia*, 74 U.S. (7 Wall.) 571 (1869); *Reichart v. Felps*, 73 U.S. (6 Wall.) 160 (1868); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

86. Moreover, after *Pollock*, the Court's use of judicial review to void legislation sharply increased, particularly state statutes regulating private economic activity. Between 1897 and 1937, the Court struck down 209 state statutes on Fourteenth Amendment grounds, 176 of which were business regulations, a sharp increase from the prior century. CLINTON, *supra* note 23, at 207. By the same token, the Court struck down fifty-five congressional statutes during the 1896-1936 time period, far more than during the Court's first century. *Id.* The Court was particularly active declaring state and federal statutes unconstitutional during the 1920s.

decisions of the late nineteenth century,⁸⁷ far more controversial than *Plessy v. Ferguson*⁸⁸ the following term.⁸⁹ The decisions provoked a strong "anti-Court" sentiment across the nation. As historian Michael Kammen has noted, after 1895 "the Court ceased to be sacred" in the minds of many Americans: "[o]nly in the wake of Dred Scott had politicization of the Court been more severe, and polarization over constitutional issues more sharp."⁹⁰ William Howard Taft later commented that "[n]othing has ever injured the prestige of the Supreme Court more" than the *Pollock* decisions.⁹¹ For only the third time in the Court's history, popular reaction led to a constitutional amendment reversing a Court decision.⁹² Idaho Senator William Borah predicted that if the proposed income tax amendment failed, "the greatest war in history will be fought

87. In 1895, the Court issued two other decisions that also provoked a public outcry: *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), in which the Court narrowly construed the Sherman Act to uphold the lawfulness of the Sugar Trust, and *In re Debs*, 158 U.S. 564 (1895), in which the Court upheld the use of a labor injunction against labor leader Eugene Debs. These two decisions, along with *Pollock*, caused many, in the words of one scholar, to view the Court not as "a tribunal of justice, whose members sought their guidance from the Constitution, the wisdom of the past, and the public conscience, but instead a body of appointed men seeking to protect propertied interests by rejecting the past and rigging the future." JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 74 (1978).

88. 163 U.S. 537 (1896).

89. As one scholar has noted, the *Pollock* decisions quickly became "a topic of heated discussion in every bank, barbershop, and barroom in the nation." Alan Furman Westin, *The Supreme Court, The Populist Movement and the Campaign of 1896*, 15 J. POLITICS 3, 22 (1953); see also Jones, *supra* note 70, at 198 ("No case of recent times has occasioned so much discussion and notoriety as that of *Pollock v. Farmers' Loan and Trust Company* . . .").

Press reaction to the *Pollock* decisions varied widely. The *St. Louis Post-Dispatch* argued that "[t]o-day's decision shows that the corporations and plutocrats are as securely entrenched in the Supreme Court as in the lower courts which they take such pains to control." Quoted in Ellis, *supra* note 59, at 240. The *New York Sun*, on the other hand, claimed that "[t]he wave of socialistic revolution has gone far, but it breaks at the foot of the ultimate bulwark set up for the protection of our liberties." *Id.* at 241.

90. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 191-92 (1986).

91. Quoted in Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 5 (1999).

92. The Eleventh Amendment (1798) was promulgated specifically to reverse the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Multiple factors led to the promulgation of the Fourteenth Amendment (1868), but the Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), was certainly a primary one. The *Pollock* decision was reversed by the Sixteenth Amendment (1913).

around the wreck of the Supreme Court."⁹³

During the election of 1896, both the Democrats and Populists campaigned against the Court,⁹⁴ evoking memories of the 1860 election in which the Court's *Dred Scott* decision had played an important role.⁹⁵ The 1896 Democratic Party platform demanded a curb on the Court's power to review the constitutionality of congressional legislation.⁹⁶ Some called for the impeachment of those justices comprising the *Pollock* majority. Sylvester Pennoyer, a former Democratic-Populist governor of Oregon, attacked the *Pollock* decisions in a series of articles in the *American Law Review* in 1896, calling for "the impeachment of the nullifying judges of the Supreme Court."⁹⁷ Recognizing that Chief Justice Fuller had relied upon *Marbury* (and Chief Justice Marshall) to justify the Court's exercise of judicial review, Pennoyer attacked *Marbury* as an unprincipled decision and Marshall for introducing "judicial oligarchy":

Ever since 1803, when the Supreme Court assumed the right to supervise the laws of Congress [citing *Marbury*], . . . we have had a substituted government, under which Congress has abrogated the exclusive prerogative of making laws conferred upon it by the Constitution. We have, during this time, been living under a government not based upon the Federal Constitution, but under one created by the plausible sophistries of John Marshall. . . . Our constitutional government has been supplanted by a judicial oligarchy.⁹⁸

93. KAMMEN, *supra* note 90, at 202-03.

94. *Id.* at 191.

95. ROBERT K. CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 258 (1942) (The Republican platform of 1860 denounced the *Dred Scott* decision as a "dangerous political heresy.").

96. KERMIT L. HALL, *THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY* 31 (1985). Historian Carl Degler has noted of the 1896 election: "The class consciousness and even class hatred that ran through the speeches and literature of the presidential campaign of 1896 came close to making Justice Field a prophet" for his prediction in his *Pollock* concurrence of a "war of the poor against the rich." CARL DEGLER, *THE AGE OF THE ECONOMIC REVOLUTION 1876-1900*, at 124 (1967).

97. Sylvester Pennoyer, *A Reply to The Foregoing*, 29 AM. L. REV. 856, 863 (1895) [hereinafter Pennoyer, *A Reply*].

98. Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550, 557-58 (1895) (footnote omitted). Pennoyer made a similar claim in a subsequent article:

In the case of *Marbury v. Madison*, the foundation of a government was laid, entirely different from that which was laid by the framers of the constitution. With sophistical reasoning which may perhaps have been equaled, but which certainly was never excelled, Chief Justice Marshall educed a thesis changing our constitutional form of

The *Pollock* decisions fueled a spirited debate among legal scholars, lawyers, and politicians concerning the merits of judicial review that would last well into the twentieth century. For many, the Court's exercise of judicial review was a "usurpation" of legislative authority;⁹⁹ for others, a "charter of American liberty."¹⁰⁰

Defenders of judicial review utilized the 1901 celebration of the centennial of John Marshall's appointment as Chief Justice to support their cause.¹⁰¹ John Forrest Dillon, a sharp critic of the income tax at issue in *Pollock*, put together a three-volume collection of speeches delivered at Marshall commemoration ceremonies across the country at the behest of U.S. Supreme Court Justice George Shiras, a controversial member of the *Pollock* majority.¹⁰² Justice Shiras encouraged Dillon to take up the project

government in to a judicial oligarchy

Pennoyer, *A Reply*, *supra* note 97, at 862 (footnote omitted); see also Sylvester Pennoyer, *The Case of Marbury v. Madison*, 30 AM. L. REV. 188, 201 (1896) (criticizing "the usurpation by the Federal courts of the legislative power").

99. For example, in 1898, John Akin, president of Georgia Bar Association, lamented the rise of judicial review in his annual address, referring to the "frightful ghost of Marshallism" that has been "resurrected in the modern Federal judiciary and stalks abroad unmasked." John W. Akin, *Aggressions of the Federal Courts*, 32 AM. L. REV. 669, 696 (1898). Akin claimed that "the vast majority of the people, and probably of the bar, believe that the Federal courts have usurped powers not lawfully theirs . . ." *Id.*; see also Camm Patteson, *The Judicial Usurpation of Power*, 10 VA. L. REG. 855, 855 (1905) (claiming that "the greatest danger which threatens the American republic is the judicial usurpation of power").

100. CLINTON, *supra* note 23, at 14; see, e.g., Junius Parker, *The Supreme Court and Its Constitutional Duty and Power*, 30 AM. L. REV. 357, 362 (1896) (arguing that "[i]n times of political upheaval, of sectional animosity, of Communistic uprising, the nine quiet men who spend their lives away from the political field, free from the necessity of demagoguery, constitute . . . the very sheet-anchor of the institutions of our land").

101. Marshall Day celebrations, heavily promoted by the conservative American Bar Association, were held in February 1901 in thirty-eight states and the District of Columbia; ceremonies in the U.S. Capitol building were attended by members of Congress, the Supreme Court, and the diplomatic corps. KAMMEN, *supra* note 90, at 209-10; 2 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at 124.

102. The vote in the first *Pollock* decision striking down the taxation of income derived from real property had been six to two, but the Court had divided four to four on the question of income derived from personal property and so scheduled reargument. The tally of how each justice voted on the personal property issue was not disclosed. Justice Jackson, absent from the deliberations and vote in the first decision, was present for the reargument and voted to sustain the tax as it pertained to income derived from personal property. Given that four justices had voted earlier to sustain the tax with respect to income from personal property, Jackson's vote appeared to provide a fifth vote to sustain the tax. But the second *Pollock* decision declared the tax on

so as to establish "a consensus of opinion concerning Marshall on the part of eminent lawyers in all parts of the country."¹⁰³ Dillon's three-volume set of speeches from Marshall Day celebrations provides a fascinating snapshot of the emergence of both *Marbury* and Marshall as important reference points in the defense of judicial review, as well as the coming of age of *Marbury* as a "great case."

The Marshall commemoration became a convenient forum for proponents of judicial review to appropriate Marshall's status to their cause. In fact, Marshall Day speakers devoted considerably more attention to *Marbury* than to any other Marshall opinion, including *McCulloch v. Maryland*.¹⁰⁴ With the recent controversies over the use of judicial review to protect private property from Populist legislative encroachment clearly in mind, Dillon, in his introduction to the three-volume set, asserted the profound importance of *Marbury*:

And what a change Marshall wrought [in *Marbury*!]! The popular notions a century ago were deeply tintured with the doctrines and theories engendered by the French Revolution—the supreme and uncontrollable right of the people to govern. *Marbury's Case* opened a new chapter in the history of constitutional governments. That decision said to Congress, . . . "if you enact a law in conflict with the Constitution it is utterly void, and the court, although only a co-ordinate department, has the right under the Constitution so to decide, and such decision is authoritative and final, binding throughout the land upon States and people." . . . Verily a new charter of individual rights and liberties was here proclaimed.¹⁰⁵

This rhetorical connection between *Marbury* and the protection of liberty was deployed by other speakers as well. Georgia attorney

income derived from personal property unconstitutional on a five to four vote. Thus, one justice, whose identity was unknown, changed his vote between the first and second decisions. The culprit was widely believed to be Justice Shiras. As historian Arnold Paul notes, "Shiras was soon subjected to an outpouring of violent obloquy by the supporters of the income tax, furious that one man's vacillation should have wrecked the whole tax." PAUL, *supra* note 51, at 214. Historians have subsequently questioned whether in fact Shiras was the guilty party. *Id.* at 215-16.

103. 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at viii.

104. 17 U.S. (4 Wheat.) 316 (1819). In his introduction to the three-volume set of Marshall speeches, Dillon commented on the substantial attention given in those speeches to *Marbury*: "[i]t was inevitable that on Marshall Day renewed attention should be called to the original and distinctively American feature in our governmental polity which Jefferson called the 'judicial veto.'" 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at xx.

105. 1 *id.* at xviii.

Burton Smith called the *Marbury* decision an "epoch in the world's history" and a "bulwark of liberty and civilization, towering above all others erected by the Anglo-Saxon race!"¹⁰⁶

Among the speeches celebrating Marshall's appointment in Dillon's volumes was a lengthy one by a New York lawyer, Bourke Cockran. After lauding Marshall's decision in *Marbury* for establishing "the most extraordinary feature of our political system," Cockran made the unsupportable claim that "[n]ever has the Supreme Court exercised its supreme power of setting aside a law of Congress or of a State that the people did not sustain its course with substantial unanimity,"¹⁰⁷ ignoring the fact that several of the Court's recent exercises of judicial review, as in *Pollock*, had provoked strong opposition.¹⁰⁸ Cockran went on to belittle legislative bodies: "the close of the nineteenth century witnessed a decline in the popularity of those parliamentary institutions which, at its beginning, were universally believed to be the sure panacea for all social or economic ills."¹⁰⁹ In contrast, Cockran extolled the judiciary, describing it as the one branch of government "untainted by any breath of suspicion, to which the people are so passionately attached that the slightest attempt to disturb its independence or even to review its decisions at the ballot box would be the ruin of the political party suggesting it."¹¹⁰ Though the legislative branch may create conditions in which "industry languishes, prosperity withers, civilization itself is imperiled," the people are safe, Cockran argued,

106. 2 *id.* at 122. See also *supra* text accompanying notes 3-5 for additional comments about the *Marbury* decision offered at the Marshall Day celebrations.

107. 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at 416.

108. Other prominent defenders of judicial review also promoted the fiction that its exercise was non-controversial. Joseph Choate, the attorney who successfully challenged the federal income tax in the *Pollock* case, addressed a London audience in 1903 while serving as the U.S. ambassador to the Court of St. James on the role of the Supreme Court in the American constitutional system. Choate claimed that although the Supreme Court since 1791 had declared numerous state and federal statutes unconstitutional, "in each instance there has been complete and peaceful acquiescence in the decision," a claim contradicted by the adverse popular reaction to cases such as *Dred Scott*, the *Civil Rights Cases*, and *Pollock*. Joseph H. Choate, *The Supreme Court of the United States: Its Place in the Constitution*, 176 N. AM. REV. 927, 935-36 (1903).

109. 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at 416-17. Cockran elaborated: "In this county [sic], representative bodies have not escaped the disrepute which has overtaken them in other lands. With us corruption is sometimes attributed to Congress, quite generally to State legislatures, universally to municipal councils. . . . When Parliament is supreme, corruption of legislative bodies undermines the life of the whole State." 1 *id.* at 417-18.

110. 1 *id.* at 417.

because of the courts and their willingness to embrace principles of judicial review developed by Marshall in *Marbury*: "while the courts remain true to the example and precepts of Marshall, all the essential rights of the citizen are as secure as the earth under his feet—they can no more be invaded than the stars in heaven can be blotted from his gaze."¹¹¹

One cannot read these three volumes of tributes to Marshall without being struck by the fact that a significant portion of the elite American bar in 1901 now recognized the *Marbury* decision as central to their defense of judicial review. Indeed, those eager to roll back the tide of legislative excess deployed *Marbury* with considerable rhetorical force. In the process, the profile of the *Marbury* decision in the American legal consciousness soared; by the early twentieth century, the decision "had gained almost religious acceptance" among conservative lawyers "because it said just what they wanted to hear."¹¹² Not surprisingly, some of the speakers at the 1901 commemoration of Marshall's appointment suggested that there be "another centennial in 1903 to celebrate *Marbury v. Madison* properly."¹¹³

By the same token, the conservative bar sought to enhance John Marshall's stature and to use that stature (along with his authorship of *Marbury*) in the defense of judicial review.¹¹⁴ Marshall certainly enjoyed prominence throughout the nineteenth century,¹¹⁵

111. 1 *id.* at 418. Cockran elaborated:

Has not the general welfare been promoted beyond the wildest hopes of the fathers since the security of property encourages industry to wring measureless abundance from a fruitful soil? Are not the blessings of liberty . . . beyond fear of invasion or danger of abridgement by the effective protection which the judiciary casts over the essential rights of every citizen?

1 *id.* at 419.

112. DONALD O. DEWEY, *MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON* 183 (1970).

113. *Id.* at 184. The conservative bar, in particular the American Bar Association, also launched a "campaign of education" during the first decade of the twentieth century whereby they attempted to "convince the public that judges merely declare the law and have no part in the making of it." TWISS, *supra* note 38, at 146. These efforts were meant to counteract the criticism of Progressive critics of judicial activism. *Id.* at 146-47.

114. As Donald Dewey has noted, the "various celebrations in 1901 of the centennial of John Marshall's appointment worshiped John Marshall and judicial review as one." DEWEY, *supra* note 112, at 184.

115. As Michael Kammen has noted, "Marshall's prestige remained high" during the nineteenth century, but "[e]ven so, he was not a cynosure of attention during the half century following his death in 1835." KAMMEN, *supra* note 90, at 209. Although a statue of Marshall was completed and presented to the United States Supreme Court for display in 1884 and a Marshall biography appeared in 1885, Marshall would not gain the lofty status that he enjoys today

but as Kent Newmyer has noted, "Marshall's incorporation into the conservative constitutional construct of the late nineteenth century helped consolidate his mythic status."¹¹⁶ In the early years of the twentieth century, Marshall's home in Richmond was saved from destruction and given to the Association for the Preservation of Virginia Antiquities which opened the home to the public in 1913 as "a shrine of American constitutionalism."¹¹⁷ In his 1908 classic study *Constitutional Government*, Woodrow Wilson called Marshall "[b]y common consent the most notable and one of the most statesmanlike figures in our whole judicial history"¹¹⁸ Marshall enjoyed considerably more attention from biographers during the early twentieth century than he had during the nineteenth century; in fact, with the publication of Albert Beveridge's magisterial four-volume biography of Marshall during the second decade of the twentieth century, the hagiography of the great Chief Justice was complete.¹¹⁹

The Supreme Court joined the 1901 celebration of both Marshall and the *Marbury* decision. Several of the justices, including Chief Justice Melville Fuller and Justices David Brewer and Horace Gray, each a member of the *Pollock* majority, gave

until early in the twentieth century. *Id.*; see ALLAN B. MAGRUDER, JOHN MARSHALL (1885).

116. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 473 (2001). But some contemporaries offered a different construction of Marshall. New York lawyer Louis B. Boudin, in an important 1911 article in the *Political Science Quarterly*, argued that Marshall's greatness lay not in his articulation of judicial review but in his expansive interpretation of the powers of Congress:

In my opinion Marshall's great place in the history of our country is due, not to any doctrine of the limitations of the legislative power, which others deduced from that decision more than half a century later and with but doubtful warrant, but to the liberal spirit in which he interpreted, and thus helped to develop, the legislative powers of Congress.

Boudin, *supra* note 12, at 256.

117. Quoted in KAMMEN, *supra* note 90, at 209.

118. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 158 (1908).

119. 1-4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (Vols. 1-2 1916, Vols. 3-4 1919). In 1919, the distinguished political scientist Edward S. Corwin published a favorable biography of Marshall, although Corwin criticized Marshall's *Marbury* decision for declaring section 13 of the Judiciary Act of 1789 unconstitutional. EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT (1919). Corwin wrote of Marshall: "Marshall established judicial review; he imparted to an ancient legal tradition a new significance; he made his Court one of the great political forces of the country; he founded American Constitutional Law" *Id.* at 230.

Marshall Day speeches extolling *Marbury* and judicial review.¹²⁰ Fuller, in fact, addressed his remarks to a joint session of Congress, the first time a Chief Justice of the United States Supreme Court had ever done so.¹²¹

In the meantime, the justices began to utilize the *Marbury* decision with greater regularity to support exercises of judicial review. For example in early 1901, as the nation commemorated Marshall's appointment, Justice Brewer wrote an opinion in *Fairbank v. United States*¹²² in which the Court struck down another federal tax on constitutional grounds. Early in his opinion for the Court, Justice Brewer quoted at length from *Marbury*'s discussion of judicial review (which Brewer characterized as "forcibly declared by Chief Justice Marshall") to justify the Court's actions.¹²³ A few weeks later, Chief Justice Fuller wrote a dissenting opinion in *Downes v. Bidwell*,¹²⁴ a case in which the Court sustained the constitutionality of a federal statute governing Puerto Rico. Chief Justice Fuller deployed *Marbury* to support his argument for an exercise of judicial review: "[f]rom *Marbury v. Madison* to the present day, no utterance of this court has intimated a doubt that . . . the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate . . . to constitutional ends."¹²⁵ Two years later, when the Court declined in a narrow vote to hold unconstitutional a federal statute prohibiting the movement of lottery tickets between states, Chief Justice Fuller, writing for four dissenting justices, relied on *Marbury* to support the argument that the Court should declare the statute in question unconstitutional.¹²⁶ During the eight years since *Pollock*, the Court's activist justices had helped solidify the connection between *Marbury* and judicial review.

Thereafter, the Court would reaffirm this connection. In a 1911

120. Justice Gray, for example, gave considerable emphasis to *Marbury*, which he described as "[o]ne of the earliest and most important judgments of Marshall." 1 LIFE, CHARACTER AND JUDICIAL SERVICES, *supra* note 3, at 66. Chief Justice Fuller claimed that the Constitution "exclusively committed [to the judiciary] the ultimate construction of the Constitution." 1 *id.* at 4.

121. Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399, 1412 (2002).

122. 181 U.S. 283 (1901).

123. *Id.* at 285-86.

124. 182 U.S. 244 (1901).

125. *Id.* at 359 (Fuller, C.J., dissenting).

126. *Champion v. Ames*, 188 U.S. 321, 372 (1903) (Fuller, C.J., dissenting) ("The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British Parliament, and . . . is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary." (citing and quoting *Marbury*)).

opinion in which the Court found a congressional statute conferring jurisdiction unconstitutional, Justice William Day asked: "When may this court . . . pass upon the constitutional validity of an act of Congress?"¹²⁷ Answering for a unanimous Court, Day noted that "[t]hat question has been settled from the early history of the court, the leading case on the subject being *Marbury v. Madison*."¹²⁸ In 1926, Chief Justice William Howard Taft described the *Marbury* decision as "one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority . . . in respect to the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress"¹²⁹

Constitutional law treatises published after 1900 bore a very different quality with respect to judicial review and the importance of *Marbury* in comparison with their nineteenth-century predecessors. Almost without exception, the status of *Marbury* is significantly elevated. Most early twentieth-century treatises devoted a separate section to a discussion of the case. For example, University of Illinois law dean Albert Putney, in his 1908 treatise, *United States Constitutional History and Law*, labeled the decision in *Marbury* "among the most important ever rendered by the Supreme Court"—a claim no nineteenth-century treatise could or did make—and devoted a section of his treatise to a discussion of the case.¹³⁰ Westel Willoughby, a political scientist at Johns Hopkins University, opened his two-volume 1910 treatise, *The Constitutional Law of the United States*, with a section on "The Courts and Unconstitutional Laws," followed by a section on "*Marbury v. Madison*."¹³¹ University of Washington political scientist Charles Martin published a 1928 text on the American Constitution; his chapter "The Power of the Supreme Court to Set Aside Acts of Congress" was comprised entirely of a discussion of *Marbury*.¹³²

127. *Muskrat v. United States*, 219 U.S. 346, 357 (1911).

128. *Id.*

129. *Myers v. United States*, 272 U.S. 52, 139 (1926).

130. ALBERT H. PUTNEY, *UNITED STATES CONSTITUTIONAL HISTORY AND LAW* § 193 (1908).

131. 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 2-4 (1910).

132. CHARLES E. MARTIN, *AN INTRODUCTION TO THE STUDY OF THE AMERICAN CONSTITUTION: A STUDY OF THE FORMATION AND DEVELOPMENT OF THE AMERICAN CONSTITUTIONAL SYSTEM AND OF THE IDEALS UPON WHICH IT IS BASED WITH ILLUSTRATIVE MATERIALS* 111-13 (1928); *see also* 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION* 754 (Henry St. George Tucker ed., 1899) (Washington and Lee law professor John Tucker, in his posthumously published 1899 constitutional law treatise, grounded his discussion of judicial review in

Constitutional law casebooks of the late nineteenth century generally did not emphasize *Marbury v. Madison*. In his landmark 1894 constitutional law casebook, for example, Harvard law professor James Bradley Thayer included *Marbury* as one of the cases that his students would read on the topic "Written Constitutions in the United States," but placed no special emphasis on the decision. Thayer's students read an array of materials in addition to *Marbury* that addressed judicial review, including four state court decisions from the 1780s, Federalist Number 78, a federal circuit court opinion from 1795, and the famous 1825 critique of judicial review by Pennsylvania Supreme Court Justice John Gibson in *Eakin v. Raub*¹³³ which Thayer characterized as "the ablest discussion of [judicial review] which I have ever seen."¹³⁴ In fact, in his landmark 1893 article in the *Harvard Law Review* on American constitutional law, Thayer labeled *Marbury* an "overpraised" decision.¹³⁵ Two years after Thayer published his 1894 casebook, University of Minnesota law professor John Day Smith published another constitutional casebook in which he omitted the *Marbury* decision altogether.¹³⁶

But those constitutional law casebooks published after the turn of the twentieth century featured *Marbury* as a significant case. Emlin McClain, Chancellor of the Law Department of the University of Iowa, published a *Selection of Cases on Constitutional Law* in 1900; McClain's section on "Judicial Restraints on Legislative Encroachments" was comprised entirely of the *Marbury* decision.¹³⁷ University of Chicago Law Dean James Parker Hall's 1913

"the masterly judgment of the great Chief Justice in the case of *Marbury v. Madison*.").

One constitutional law treatise of the early twentieth century did not give *Marbury* preeminent status in its discussion of judicial review. Ohio attorney David Watson published a two-volume constitutional law treatise in 1910. Although Watson discusses "the great case of *Marbury v. Madison*" in the context of a larger discussion of "Judicial Power Over Legislation," he does not feature *Marbury* as the central case establishing the principle of judicial review. 2 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION* 1182 (1910).

133. 12 Serg. & Rawle 330, 344-45 (Pa. 1825).

134. THAYER, *supra* note 11, at 48-206; Thayer, *supra* note 14, at 130 n.1.

135. Thayer, *supra* note 14, at 130 n.1.

136. JOHN DAY SMITH, *CASES ON CONSTITUTIONAL LAW* (1896). But in 1898, Chicago attorney Carl Evans Boyd did publish a constitutional law casebook which opened with a chapter entitled "The Validity of Legislation" which was comprised entirely of the *Marbury* decision. CARL EVANS BOYD, *CASES ON AMERICAN CONSTITUTIONAL LAW* 17-25 (1898).

137. EMLIN MCCLAIN, *A SELECTION OF CASES ON CONSTITUTIONAL LAW* 815-18 (1900).

casebook, *Cases on Constitutional Law*, featured *Marbury* in its section on "Power to Declare Statutes Unconstitutional" following an excerpt from the Federalist Papers.¹³⁸ Dean Hall's 1914 *Illustrative Cases on Constitutional Law* opened its chapter on "Construction and Interpretations of Constitutions" with the *Marbury* decision.¹³⁹ In 1916, the Harvard Government Department produced a volume entitled *Leading Cases on the Constitution of the United States* for use in teaching government classes at the university. The volume included eighteen cases and began with *Marbury v. Madison*.¹⁴⁰

Finally, litigants challenging the constitutionality of legislation before the Supreme Court in the early twentieth century featured the *Marbury* decision in their briefing, a practice not followed in the nineteenth century.¹⁴¹ For example, in *Adair v. United States*,¹⁴² a case involving the constitutionality of a congressional statute banning "yellow dog" contracts, the petitioner included a section in his brief entitled "The Duty of the Courts as to Unconstitutional Acts of Congress" that featured a lengthy discussion of *Marbury*.¹⁴³ Litigants in several other early twentieth-century cases did likewise.¹⁴⁴

138. JAMES PARKER HALL, *CASES ON CONSTITUTIONAL LAW WITH SUPPLEMENT SELECTED FROM DECISIONS OF STATE AND FEDERAL COURTS* 28-31 (1913, 1926).

139. JAMES PARKER HALL, *ILLUSTRATIVE CASES ON CONSTITUTIONAL LAW* 8-11 (1914).

140. *LEADING CASES ON THE CONSTITUTION OF THE UNITED STATES* 1-6 (Harvard Univ. ed., 1916). For other examples, see Harvard Law Professor Eugene Wambaugh's *A Selection of Cases on Constitutional Law* which reproduced the *Marbury* decision in its inaugural chapter on "The Distinction Between Legislative, Executive, and Judicial Powers," EUGENE WAMBAUGH, *A SELECTION OF CASES ON CONSTITUTIONAL LAW* 23-33 (1915), and Cornell Government Professor Robert Cushman's *Leading Constitutional Decisions* in which Cushman opened his chapter on "The Judiciary" with *Marbury*. ROBERT EUGENE CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 155-61 (revised ed. 1929).

But not every early twentieth-century constitutional law casebook treated *Marbury* in this fashion. Philadelphia attorneys H. Edgar Barnes and Byron A. Milner published a constitutional law casebook in 1910. They included *Marbury*, but in the section that addressed "The President's Power of Appointment." H. EDGAR BARNES & BYRON A. MILNER, *SELECTED CASES IN CONSTITUTIONAL LAW* 31-36 (7th ed. 1924). St. John's University law professor Maurice Finkelstein published a 1927 constitutional law treatise in which he included *Marbury* in the section on "Political Questions." MAURICE FINKELSTEIN, *CASES ON CONSTITUTIONAL LAW* 88 (1927).

141. See *supra* note 68 for examples of nineteenth-century litigants that did not rely on *Marbury*.

142. 208 U.S. 161 (1908).

143. Brief for Plaintiff in Error at 43-44, *Adair v. United States*, 208 U.S. 161 (1908) (No. 293).

144. See Brief for Appellees at 56-57, *Adkins v. Children's Hosp.*, 216 U.S.

To be sure, many lawyers and scholars of the early twentieth century continued to criticize both *Marbury* and the principle of judicial review.¹⁴⁵ Moreover, between 1898 and 1921, Congress considered six bills to limit the power of the Supreme Court, including legislation that would have required a supermajority of justices to invalidate legislation; between 1922 and 1924, Congress considered eleven additional such bills.¹⁴⁶ At the same time, many state legislatures provided for judicial recall and imposed restrictions on judicial review.¹⁴⁷ But judicial review would survive and over the course of the twentieth century would become an increasingly prominent feature of the American constitutional system.

IV. *MARBURY* SINCE THE ONSET OF THE WARREN COURT

During the last half-century, aspects of the *Marbury* decision have continued to come under sharp criticism from legal scholars.¹⁴⁸ But since the onset of the Warren Court, the Court has cited *Marbury* for the principle of judicial review far more frequently than at any comparable time in the Court's history.¹⁴⁹ Particularly when

525 (1923) (Nos. 795, 796) (citing *Marbury* for principle of judicial review); Brief for Defendant-in-Error at 43-44, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (No. 657) (citing *Marbury* for the principle of judicial review); Brief on the Part of the Plaintiff in Error at 35-37, *Frohwerk v. United States*, 249 U.S. 204 (1919) (No. 685) (quoting *Marbury* at length to support exercise of judicial review).

145. See, e.g., ROSS, *supra* note 55, at 49-69 (describing various critics of judicial review during the first two decades of the twentieth century); Boudin, *supra* note 12, at 248 (arguing in 1911 that the Constitution did not provide for judicial review); Walter Clark, *Some Myths of the Law*, 13 MICH. L. REV. 26, 30-31 (1914) (describing as a "myth" the notion that "courts have the power to set aside an act of Congress, or of a state legislature" and that "[i]t has no validity apart from the acquiescence or toleration which has been accorded it").

146. SEMONCHE, *supra* note 87, at 425.

147. For example, in the early twentieth century, five states amended their constitutions to provide for judicial recall; Ohio amended its constitution to provide that the Ohio Supreme Court could not declare a state statute unconstitutional if more than one justice dissented. Clark, *supra* note 145, at 32.

148. For one of the more compelling and influential critiques of *Marbury*, see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

149. Justice Hugo Black, in particular, cited "the great opinion of Chief Justice Marshall in *Marbury v. Madison*" with great regularity. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 223 (1960) (Black, J., dissenting). Frequently, when Black dissented from an exercise of judicial review, he would nevertheless articulate his fidelity not merely to the principle of judicial review, but specifically to Marshall's decision in *Marbury*. See, e.g., *Goldberg v. Kelly*, 397

the Court has engaged in (or declined to engage in) a controversial exercise of judicial review, justices on both sides of the issue have tended to cite *Marbury* as support for their position.¹⁵⁰ This tendency to cite *Marbury* in high-profile cases shows no sign of abating. In several of the most controversial exercises of judicial review of the past decade, including *United States v. Lopez*,¹⁵¹ *City of Boerne v. Flores*,¹⁵² and *United States v. Morrison*,¹⁵³ the Court

U.S. 254, 274 (1970) (Black, J., dissenting) (in dissenting from Court's holding that procedures in connection with termination of welfare benefits are unconstitutional, Black affirms that "*Marbury v. Madison* held, and properly, I think, that courts must be the final interpreters of the Constitution" (citation omitted)); *Hunter v. Erickson*, 393 U.S. 385, 397 (1969) (Black, J., dissenting) (in dissenting from Court's holding that a city charter violates the equal protection clause, Black states that "[o]f course the Court under the ruling of *Marbury v. Madison* has power to invalidate state laws that discriminate on account of race" (citation omitted)); *Griswold v. Connecticut*, 381 U.S. 479, 513 (1965) (Black, J., dissenting) (noting that though he disagreed with the majority's use of judicial review to strike down the Connecticut birth control law, "I completely subscribe to the holding of *Marbury v. Madison*, that our Court has constitutional power to strike down statutes" (citations omitted)). In fact, Black cited *Marbury* more frequently than any other member of the Court.

150. For example, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), an important Tenth Amendment decision, Justice Lewis Powell dissented, arguing that the deference given by the majority to Congress constituted a rejection of "the role of the judiciary in protecting the States from federal overreaching" and disregard for "the teaching of the most famous case in our history." *Id.* at 567 (Powell, J., dissenting); see also *City of Rome v. United States*, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting) (in dissenting from a decision that Congress did not exceed its constitutional power in enacting the Voting Rights Act, Rehnquist argued that "[w]hile the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities. *Marbury v. Madison*"); *Younger v. Harris*, 401 U.S. 37, 52 (1971) (Court justifies refusal to grant equitable relief against prosecution in state court under a state statute of questionable constitutionality, noting that although judges have "[t]he power and duty . . . to declare laws unconstitutional" under *Marbury*, "this vital responsibility . . . does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.").

151. 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[A]s the branch whose distinctive duty it is to declare 'what the law is,' *Marbury v. Madison*, we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." (citation omitted)).

152. 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.").

153. 529 U.S. 598, 617 n.7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

embraced *Marbury* in defense of its decision to strike down popular congressional legislation.¹⁵⁴

But the Court during the past half century has deployed *Marbury* for more ambitious purposes than merely to justify an exercise of judicial review. In a number of cases, the Court has used *Marbury* to justify the Court's assertion that its interpretations of the Constitution are supreme over those of other governmental actors, a claim that Marshall did not make in his *Marbury* decision.

This trend began in 1958, when the Court confronted open defiance of its earlier decision in *Brown v. Board of Education*¹⁵⁵ by governmental authorities in Little Rock, Arkansas, who resisted implementation of a school desegregation decree and claimed that they were not bound by the Court's interpretation of the Fourteenth Amendment in the *Brown* decision. In *Cooper v. Aaron*,¹⁵⁶ the Court, engaging in what many scholars have characterized as an expansion of the meaning of *Marbury*,¹⁵⁷ relied on the decision to assert its authority as the "supreme" interpreter of constitutional text:

[W]e should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department

154. Justice Antonin Scalia captured the revered status that *Marbury* enjoys on the current Court in his 1999 defense of the Court's Eleventh Amendment jurisprudence in which he characterized critiques of that jurisprudence as having been "rejected by constitutional tradition and precedent as clear and conclusive, and almost as venerable, as that which consigns debate over whether *Marbury v. Madison* was wrongly decided to forums more otherworldly than ours." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 688 (1999) (citation omitted).

155. 347 U.S. 483 (1954).

156. 358 U.S. 1 (1958).

157. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 264 (1962) (criticizing the Court in *Cooper* for claiming that "the Court and only the Court speaks in the name of the Constitution"); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 n.155 (1964) (arguing that the Court in *Cooper* confused "Marshall's assertion of judicial authority to interpret the Constitution [in *Marbury*] with judicial exclusiveness").

to say what the law is." *This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.*¹⁵⁸

Since *Cooper*, the Court has repeatedly used *Marbury* to reaffirm its claim to judicial supremacy. Most recently, in *United States v. Morrison*,¹⁵⁹ Chief Justice William Rehnquist, in language evocative of the Court's *Cooper* decision, announced: "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."¹⁶⁰

In politically charged cases taking the Court to the limits of its authority, the Court has also utilized *Marbury* to legitimate its actions. For example, in *United States v. Nixon*,¹⁶¹ the Court confronted the extraordinarily high-stakes task of assessing a claim of executive privilege by the President of the United States in a case that cut to the heart of the Nixon presidency. The Court noted that the President interpreted the Constitution as granting him an absolute privilege of confidentiality in all presidential communications and conceded that such an interpretation was entitled to great respect: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."¹⁶² Choosing to reject that broad construction of presidential privilege, the Court turned to *Marbury* for support: "Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"¹⁶³ Upon reviewing prior cases in which the Court had held that federal courts must "on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch,"¹⁶⁴ the Court proceeded to "reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case. *Marbury v. Madison*."¹⁶⁵

158. *Cooper*, 358 U.S. at 17-18 (citation omitted and emphasis added).

159. 529 U.S. 598 (2000).

160. *Id.* at 617 n.7.

161. 418 U.S. 683 (1974).

162. *Id.* at 703.

163. *Id.* (alteration in original) (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

164. *Id.* at 704 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

165. *Id.* at 705 (citation omitted) (quoting *Marbury*, 5 U.S. at 177).

Marbury's "icon" status has made it a fascinating rhetorical tool in the hands of the justices contesting divisive cases, even ones that have nothing to do with judicial review. For example, in 1978, a divided Court held in *Monell v. Department of Social Services*¹⁶⁶ that local governments were "persons" for purposes of Section 1983 liability,¹⁶⁷ a decision that reversed the Court's 1962 precedent in *Monroe v. Pape*.¹⁶⁸ In dissent, then Justice Rehnquist complained of the Court's abandonment of precedent and in particular, Justice Lewis Powell's suggestion in a concurring opinion that *Monroe* was owed less deference because the question of municipal liability "was never actually briefed or argued in this Court" and resolution of that issue was not "necessary to resolve the contentions made in that case."¹⁶⁹ "Private parties must be able to rely upon explicitly stated holdings of this Court," Rehnquist chided his colleagues, "without being obliged to peruse the briefs of the litigants to predict the likelihood that this Court might change its mind."¹⁷⁰ To bolster his argument, Rehnquist cleverly suggested that the Court's decision and Powell's rationale left the venerable *Marbury* decision vulnerable to reversal:

To cast such doubt upon each of our cases, from *Marbury v. Madison* forward, in which the explicit ground of decision "was never actually briefed or argued," (Powell, J., concurring), would introduce intolerable uncertainty into the law. Indeed, in *Marbury* itself, the argument of Charles Lee on behalf of the applicants . . . devotes not a word to the question of whether this Court has the power to invalidate a statute duly enacted by the Congress.¹⁷¹

Finally, Chief Justice Marshall's language in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he

166. 436 U.S. 658 (1978).

167. *Id.* at 662-63.

168. 365 U.S. 167 (1961).

169. *Monell*, 436 U.S. at 708-09 (Powell, J., concurring).

170. *Id.* at 717-18 (Rehnquist, J., dissenting).

171. *Id.* at 718 (citations omitted). In a similar vein, Justice Scalia, in his dissent in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), criticized as "contrived" the plurality's use of *stare decisis* pursuant to which it retained only the "central holding" of *Roe v. Wade*. *Id.* at 993 (Scalia, J., dissenting). Scalia questioned whether the plurality's analysis might affect the Court's decision in *Marbury*: "I wonder whether, as applied to *Marbury v. Madison*, for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts." *Id.* (citation omitted).

receives an injury"¹⁷² has been used by various justices to justify the establishment of private rights of action under constitutional provisions¹⁷³ or to criticize the Court for refusing to provide a remedy for a constitutional violation where no specific remedy has been provided by a coordinate branch of government.¹⁷⁴

172. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

173. See, e.g., *Davis v. Passman*, 442 U.S. 228, 242 (1979) (holding that the plaintiff has a private right of action under the Due Process Clause of the Fifth Amendment to sue a Member of Congress for sex discrimination, quoting Chief Justice Marshall in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that the plaintiff has a private right of action under the Fourth Amendment, quoting Chief Justice Marshall in *Marbury*).

Justices critical of implied rights of action have also used *Marbury* to defend their position. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), Justice Powell dissented from the Court's finding a private right of action under Title IX of the Education Amendments of 1972, noting that:

[w]hile '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury v. Madison*, it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.

Id. at 744 (Powell, J., dissenting) (quoting *TVA v. Hill*, 437 U.S. 153, 194-95 (1978) (citation omitted)).

174. See, e.g., *United States v. Leon*, 468 U.S. 897, 978 & n.36 (1984) (Stevens, J., dissenting) (criticizing the Court's holding that the exclusionary rule does not apply to evidence seized by officers relying on a warrant that is subsequently determined to be defective; arguing that the Court should not "concede the existence of a constitutional violation for which there is no remedy," and quoting *Marbury* to the effect that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"); *Hobby v. United States*, 468 U.S. 339, 359 (1984) (Marshall, J., dissenting) (criticizing the Court's holding that even if a judge engaged in unconstitutional racial discrimination in the selection of a grand jury foreman, dismissal of indictment is unwarranted; accuses the Court of refusing to apply the "elementary, though oft-ignored, principle that every right must be vindicated by an effective remedy" (citing *Marbury*)); *Briscoe v. LaHue*, 460 U.S. 325, 368 (1983) (Marshall, J., dissenting) (criticizing the Court's holding that police officers have absolute immunity from damages for perjured testimony at a criminal trial, quoting *Marbury* to the effect that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws, whenever he receives an injury"); *Wheedlin v. Wheeler*, 373 U.S. 647, 656 (1963) (Brennan, J., dissenting) (criticizing the Court's holding that plaintiff has no cause of action for abuse of subpoena power by federal officer, citing *Marbury v. Madison* for "the settled principle of the accountability, in damages, of the individual governmental officer for the consequences of his wrongdoing").

V. CONCLUSION

Marbury v. Madison is now undisputably one of "the great cases" of American constitutional law, undeniably associated with the principle of judicial review.¹⁷⁵ But *Marbury's* greatness cannot be attributed to the pathbreaking character of the decision. Rather, *Marbury* has become great because, over the years, proponents of an expansive doctrine of judicial review have needed it to assume greatness.

175. As one historian of the *Marbury* decision has noted: "Right or not, flawed or not, *Marbury v. Madison* has become the symbol of American judicial review How long [judicial review] will survive . . . will depend on the use which judges of the future will make of the power for which *Marbury v. Madison* has been the rationalization and symbol." DEWEY, *supra* note 112, at 185-86.